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82-1489

No. ~~82-1389~~

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

C. A. MUNDT, *Petitioner/Cross-Respondent,*

v.

NL INDUSTRIES, INC., *Respondent/Cross-Petitioner.*

Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit And Opposition To Petitioner/Cross-Respondent's Petition

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March 11, 1983

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether the dismissal of a senior corporate officer who filed an age discrimination claim against his company, acting with an ulterior purpose and in a manner that inherently conflicted with his essential responsibility to the corporation, is unlawful retaliation under Section 4(d) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(d).

2. Whether a senior corporate officer is an "employee" entitled to the protection of the anti-retaliation provision of the Age Discrimination in Employment Act.

This cross-petition is filed in reliance upon Rule 19.5; Cross-petitioner NL Industries, Inc. received the Petition for Certiorari of Petitioner C.A. Mundt on February 25, 1983.

NL Industries, Inc. has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. ~~82-1889~~

C. A. MUNDT, *Petitioner/Cross-Respondent,*

v.

NL INDUSTRIES, INC., *Respondent/Cross-Petitioner.*

Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit And Opposition To Petitioner/Cross-Respondent's Petition

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Respondent/cross-petitioner, NL Industries, Inc. ("NL"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on December 2, 1982. Cross-petitioner NL also prays that the petition filed by petitioner/cross-respondent ("Mundt") be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported and is set forth in the Appendix hereto at A-2. The opinion of the United States District Court for the Northern District of Ohio, Western Division, is also unreported and is printed in the Appendix at A-6.

JURISDICTION

The Court of Appeals for the Sixth Circuit originally entered a judgment on October 6, 1982. A timely petition for rehearing was filed on October 18, 1982. The petition

for rehearing was granted and a final judgment and opinion (A-1) was entered on December 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Both questions presented by this petition involve the application of Section 4(d) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(d), which provides as follows:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual or for a labor organization to discriminate against any member thereof or applicant for membership because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

STATEMENT OF THE CASE

This case arose when Mr. Mundt, then a Group Vice President of NL, was not promoted to higher office. NL Industries, Inc. is a large and highly-diversified, publicly-held corporation engaged in the manufacture of chemicals and the provision of products and services to the petroleum industry.

When Ray C. Adam, NL's Chairman, originally undertook the duties of chief operating and executive officer in 1972, he concluded that the company's value was depressed because it was operating a number of unrelated businesses. He therefore set NL upon a massive course of

reorganization. Having foreseen the nation's burgeoning energy needs, Mr. Adam placed special emphasis on developing NL's petroleum services activities. In overseeing this vast transformation, Mr. Adam needed to assemble a team of executives who would be given broad authority and, consequently, in whom he would invest great trust. This was particularly the case with the company's Fabricated Products Group which Mr. Mundt was recruited to head.

Mundt began his employment as Group Vice President on April 1, 1973, at which time he was 56 and a half years old. At that time, he was told that if he demonstrated managerial success, a variety of positional and economic rewards would be open to him. However, at all times, Mr. Mundt was an admitted employee-at-will, whose employment NL could terminate at any time, subject to paying him one year's salary as a severance benefit (A-11, 19).

In view of NL's overall plan for restructuring, Mundt's jurisdiction was considerable, and his rewards were commensurate with his importance. He was the third most highly paid executive in the entire company, and was charged with the management of a unit whose sales were upwards of $400 million per year. He also had the authority to intiate capital expenditures of up to a quarter of a million dollars and to commit the company to significant new contractual obligations. This broad discretionary authority plainly made it necessary that Mr. Mundt and Mr. Adam enjoy a relationship of trust and open communication (A-14, 15).

Mundt proved to be an acceptable executive who improved the morale of his subordinates while carrying out programs that had been planned by others. He was far less successful in innovating programs of his own and in

providing the detailed analytical data that the Chairman required (A-16, 17). As a result, there developed an admitted and irreconcilable difference in managerial approach between Mundt and his superior (A-11, 12, 17). This resulted in Mundt's vocal dissatisfaction with his high but unchanging level of compensation and with what he believed to be the direction in which the company was moving, emphasizing activities relating to energy while reducing involvement in metals. He saw his role in the company becoming, at least to him, less significant (A-10).

As part of the massive reorganization of the company, Mr. Adam, in early 1976, decided to create a new managerial layer composed of three Executive Vice Presidents. Situated at corporate headquarters, these new officials would reduce the chief operating officer's burden of receiving reports from the various division heads and thus allow him to devote more of his time to the problems of the company as a whole. The new positions would also provide for the development of successors to higher corporate office, thus assuring the continuity of NL's management policies.

Because Mr. Adam did not believe that Mundt possessed the strategic planning abilities required of an Executive Vice President, in late January of 1976, the company appointed to the Executive Vice Presidencies three men, all of whom happened to be younger than Mundt. However, Adam still foresaw an important role for Mundt in the operation of the Metals Group, and so urged him to stay on to assist the new management and contribute to the growth of the company.

Mr. Mundt was plainly unhappy with the decision, especially in having now to report to a man he did not

respect. In an attempt to assuage Mundt's feelings, Adam suggested to him that NL "had to go with the younger guys." (A-7). While, as the trial court found, age was not a determinative factor in the decision not to promote Mundt, who had not been a contender for an Executive Vice Presidency, Adam's chance remark became the genesis for this lawsuit.

In the months that followed, Mundt continued with his duties, although his performance became less satisfactory. For example, his repeated complaints to subordinates about his unchanging rate of compensation began to have an adverse effect on morale (A-17, 18). Also, for reasons then unknown to his superiors, it became increasingly more difficult to obtain adequate quantitative data from Mundt (A-16, 17, 18).

Although Mundt did not communicate his concerns to his superiors, he brooded about his inability to procure capital to make acquisitions to his Group and his perception that the Group was being diminished in the wake of the company's increasing emphasis on natural resources (A-10). He therefore decided that he "wanted to be promoted or paid off" (A-12). With this admitted ulterior motive, Mundt seized upon Adam's comment about having "to go with the younger guys" and filed an administrative complaint with the Department of Labor[1] alleging age discrimination in NL's failure to promote him to Executive Vice President.

What Mundt intended to do was to "deal himself a hand" (A-13, 14), *i.e.*, to use his claim as a lever to obtain

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[1] At that time the United States Department of Labor was the agency concerned with the administration of the Age Discrimination in Employment Act. It has now been supplanted by the Equal Employment Opportunity Commission.

greater pay while attempting to alter the company's business course. In Mundt's own words:

> And I felt that the Group was being decimated. We were no longer popular, because we were not natural resources oriented, and Mr. Adam had said he was going that way. He had made a videotape, showing that the company was going that way. I was the only group vice president left in the company, and I felt that things were going downhill, and I felt rather than see myself gradually eased out, I had been a good businessman—I was a good businessman when I was hired by NL or they wouldn't have hired me, but I could see my career gradually dribbling away, and I felt that rather than see that happen, I would do something about it. (A-13.)

Quite obviously, as the trial court found, this was not an age-oriented matter but a management one.

In the weeks that followed, Mundt did nothing to inform his superiors of his concerns, despite the fact that he continued to occupy an important and confidential position. It was not until August 2, 1976, a full six months after the promotion decisions had been announced, that Mundt mentioned his discrimination claim to his immediate superior. A telephone call between Mundt and NL's Chairman soon followed, and the upshot was Mr. Mundt's being told "to leave the premises" (A-7). He then "notified his co-workers that he was taking an extended vacation" and left NL (*id.*).

After exhausting his administrative remedies, Mundt filed suit. His three-count complaint alleged: (1) that NL had violated the Age Discrimination in Employment Act ("ADEA") by discriminating against him on the basis of age in not promoting him to Executive Vice President; (2)

that the company had violated ADEA by discharging him in retaliation for filing his claim with the Labor Department; and (3) that NL owed him one year's salary ($93,000) under his employment agreement.

The case came to trial a full three years after the events that led to its filing. The District Court ultimately held in favor of NL as to the first count, finding that age was not a controlling factor and that the decision not to promote Mundt was non-discriminatory (A-7). The court held in favor of Mundt as to the second and third counts, rejecting NL's theory that by his conduct respondent had constructively resigned from his employment. The court therefore found that NL had retaliatorily discharged Mundt and also owed him a year's salary because it had initiated his departure *(id.)*. Mr. Mundt was awarded $279,000, his final annual pay computed over the three-year period between his separation and the trial.

Although the issues raised in this cross-petition were presented to the trial court, it did not deal with them in its opinion. Similarly, while the Court of Appeals reversed the District Court in part, reducing the amount of the judgment by a third, it had very little to say concerning NL's view that Mr. Mundt should not have been protected by the ADEA. The Court of Appeals avoided the issue of whether Mundt's conduct should have disqualified him from ADEA protection, and dealt only with the question of his status. Here all the court had to say was that it could find no authority or reason upon which to base an exemption, but the court, inexplicably, has ignored the holdings of this Court in an analogous area. Moreover, in failing to adopt the holdings of the First, Ninth and District of Columbia Circuits as to an identical provision found in Title VII of the Civil Rights Act of 1964

("Title VII"), 42 U.S.C. § 2000e-3(a), the Sixth Circuit has created a split among the circuits regarding the operation of the employment-discrimination laws.

NL respectfully submits that this judgment has created a situation that is intolerable to the operation of large businesses which are responsible to their stockholders, is contrary to logic, and is entirely inconsistent with a long-standing and well-developed body of case law. This judgment therefore raises important questions of federal law which should be resolved by the granting of this petition. At the same time, Mr. Mundt is petitioning this Court to review the computation of damages. Because no significant issue of law is addressed by that petition, NL submits that it should be denied.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW INTERPRETING THE ANTI-RETALIATION PROVISION OF ADEA CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS INTERPRETING AN IDENTICAL PROVISION OF TITLE VII, CREATING AN INCONSISTENCY IN THE APPLICATION OF THE EMPLOYMENT DISCRIMINATION LAWS.

Three different Circuit Courts of Appeals have held in a firm and consistent manner that it is not unlawful retaliation for an employer to terminate an employee in a sensitive position when that employee engages in conduct, including the filing of a discrimination claim, inconsistent with the essential nature of his or her responsibilities to the employer. *Smith* v. *Singer Company*, 650 F.2d 214 (9th Cir. 1981); *Pendleton* v. *Rumsfeld*, 628 F.2d 102 (D.C. Cir. 1980); *Hochstadt* v. *Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976). *See Whatley* v. *Metropolitan Atlanta Rapid Transit Author-*

ity, 632 F.2d 1325 (5th Cir. 1980). These courts properly have recognized that irrespective of the literal terms of statutes governing the relationships between employers and employees, it is necessary and proper to imply exemptions from coverage regarding the conduct of certain employees who develop and enforce employer policy. This implied exemption grows out of this Court's acknowledged concern "[t]hat an employer is entitled to the undivided loyalty of its representatives." *NLRB* v. *Yeshiva University*, 444 U.S. 672, 682 (1980); *see Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653, 661-662 (1974); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 281-282 (1974).

While *Smith*, *Pendleton* and *Hochstadt* are all cases arising under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), there are a number of sound reasons to apply their rationale to this case arising under the Age Discrimination in Employment Act.

First, as this Court has held, ADEA and Title VII are very similar statutes having related purposes. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979); *Lorillard* v. *Pons*, 434 U.S. 575 (1978). This relationship of purpose has been strengthened by the now-uniform administration of both statutes by the same agency, the Equal Employment Opportunity Commission. *See*, Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), 92 Stat. 3781 (1978). Indeed, the virtually identical anti-retaliation provisions of ADEA and Title VII[2] show a clear

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[2] ADEA, 29 U.S.C. § 623(d) provides as follows:

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such

congressional intent that the two statutes be interpreted and applied consistently, and require a holding that a judicially-implied exemption to one of these statutes should govern the other.

Second, the holdings of the various Title VII cases implying an exemption to the coverage of the anti-retaliation provision when confidential or managerial employees file discrimination claims are derived from a common source: this Court's decisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, *et seq.*, in cases such as *NLRB* v. *Yeshiva University*, *supra*, and *NLRB* v. *Bell Aerospace Co.*, *supra*. The precedents are compelling in interpreting the congruent anti-retaliation provisions of ADEA and Title VII, *see International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 356 (1977), and, given the magnitude and sensitivity of Mundt's duties, these cases provide a logical basis for his exclusion from the protection of ADEA's anti-retaliation provision.

Third, and perhaps most importantly, the nature of Mundt's conduct and the admitted intention behind it present compelling evidence of the need for such an implied exemption to the ADEA. If the duties of Smith,

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individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Title VII, 42 U.S.C., § 2000e-3(a) provides as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Pendleton and Hochstadt were sensitive, Mundt's duties were even more so. Although the former persons were concerned with a single employment function at staff level, their participation and opposition activities in pursuing discrimination claims were held to be inconsistent with their responsibilities to their employers and their discharges were upheld. In Mundt's case, the issue of divided loyalty is even more profound.

Mundt was charged with the management of a $400 million-a-year business and owed a duty of frequent and accurate communication with his superiors. This duty was particularly acute in view of the massive reorientation of the company that was underway. In challenging the company's selection of the senior executives to carry out this reorganization and, by his own admission, in attempting to forestall the company's chosen emphasis on natural resources, Mundt, in essence, pitted himself against the management of which he was a part. Especially at the highest level of corporate management, where Mundt was situated, a senior officer's primary loyalty must be to his chief-executive and the board of directors. Mundt's primary loyalty, however, was to himself.

From the time that he filed his administrative claim, predicated, among other things, upon the conceded ulterior motivation of protecting his own corporate area at the expense of those areas that NL had selected for emphasis, Mundt's usefulness as an executive was at an end. The company could no longer rely upon his judgment because the course that he had chosen was inherently inconsistent with the fundamental nature of his duties. Under these

circumstances, both logic and precedent demand an exemption to the provisions of 29 U.S.C. § 623(d).[3]

II. THE DECISION OF THE COURT BELOW IS INCONSISTENT WITH OPINIONS OF THIS COURT THAT CONFIDENTIAL OR MANAGERIAL EMPLOYEES ARE CATEGORICALLY EXEMPTED FROM THE COVERAGE OF THE NATIONAL LABOR RELATIONS ACT, WHICH, BY ANALOGY, REQUIRE THAT MUNDT SHOULD BE EXEMPT FROM THE PROTECTION OF THE ANTI-RETALIATION PROVISIONS OF ADEA.

In the previous section, NL suggested that this Court should grant this petition to resolve the conflict created by the Sixth Circuit's failure to apply in the ADEA con-

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[3] The courts below erred not only in their categorical rejection of what we submit is a necessary and well-precedented exemption to the coverage of ADEA, but also in failing to follow this Court's holdings as to a plaintiff's burden of proof in such a case. If one assumes that the limits of employee protections should be evaluated in the context of their particular employment setting, *see Whatley* v. *Metropolitan Atlanta Rapid Transit Authority*, *supra*, 632 F.2d at 1328; *see also Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976), it follows that the ordered sequence of proof described by this Court in *Texas Department of Community Affairs* v. *Burdine*, 101 S. Ct. 1089 (1981), should have been required. However, it was not.

Assuming, *arguendo*, that Mundt had met his initial burden of establishing a *prima facie* case of impermissible discharge, it is clear that NL articulated a legitimate basis for its action. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under *Burdine* and *McDonnell Douglas*, Mundt then should have been required to show that NL's action was pretextual. Mundt, in fact, corroborated much of the basis for NL's action, and certainly was required to do none of things encompassed in the third phase of the *Burdine-McDonnell Douglas* order of proof. This issue was presented both to the district court before the fact and to the Court of Appeals thereafter, but neither court dealt with it in its opinion.

text the exemption to a virtually identical provision of Title VII recognized by at least three other courts of appeals. Those circuit court opinions consider both the employee's position and his conduct. Because the courts there found the dismissed employees' positions sensitive and the nature of their conduct unprotected, their discharges were upheld, notwithstanding the employees' filings of discrimination claims. However, this Court's opinions interpreting the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, *et seq.*, including *NLRB* v. *Yeshiva University*, *supra*, and *NLRB* v. *Bell Aerospace Co.*, *supra*, permit the application of a broader principle, *i.e.*, that senior corporate officers such as Mundt should be categorically exempted from the protections of section 623(d).

In these cases, this Court recognized that confidential or managerial employees who develop or enforce employer policy cannot be covered by the provisions of the NLRA. The Court therefore held that an exemption for such employees must be implied. Applying the principle articulated in these cases to the instant matter, it is clear that the reasons for exempting low-level managers from the coverage of the NLRA are just as compelling for exempting senior corporate officers from the anti-retaliation provision of ADEA. Indeed, NL submits that it is appropriate to say that a corporate officer such as Mundt, who was situated at the highest level of managerial responsibility, is less an employee than he is the embodiment of the corporation itself. As a matter of law a senior corporate officer, having confidential policy-making authority, cannot be permitted to undertake a legal action against his corporation and still maintain his

position.[4] Under such circumstances, the officer's position and his action are inherently contradictory and the corporation must be held free to discharge the renegade senior officer irrespective of the type of claim that he might attempt to assert.

In sum, the decision of the Court of Appeals has created an unacceptable inconsistency in the operation of laws governing employment. This confusing division is antithetical to corporate needs that have long been recognized as proper by this Court. The issue of an implied exemption to the coverage of section 623(d) of ADEA is also an important federal question of law in itself, and justifies the granting of this petition.

OPPOSITION TO MUNDT'S PETITION

BECAUSE PETITIONER MUNDT RAISES NO SIGNIFICANT QUESTION OF FEDERAL LAW, HIS REQUEST FOR REVIEW SHOULD BE DENIED.

Petitioner Mundt contends that the Court of Appeals erred in reversing the trial court's award of three years' back pay because reinstatement was not ordered. While NL disagrees with Mr. Mundt's characterization of the original award, it respectfully suggests that he has failed not only to raise a significant question of federal law, but also to raise any question of law at all. Rather, the issue of concern to Mundt is fact-based and therefore should not be considered further by this Court.

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[4] It is significant to note that Mundt's employment agreement specifically allowed for his termination "for any reason" and provided for the payment of a liquidated amount upon severance (A-19). This provision was the basis for that part of the Court of Appeals opinion concerning the measure of damages. The court, however, failed to consider the broader implication of the provision: that it required the exemption of Mundt from the coverage of ADEA.

In describing the issue as one of back pay, Mundt overlooks the fact that the Court of Appeals held that the District Court was anything but clear about the matter. As the Sixth Circuit held:

> The orders of the district court are unclear in that recovery at one point is referred to as "back pay" and yet at another point the recovery is referred to as an amount to include $93,000.00 for one year as provided by the termination provision in the employment contract and increased by $186,000.00 for two additional years "for the retaliatory discharge." (A-3.)

While the Court of Appeals did hold on one hand that an award of back pay would have been inappropriate under the circumstances, it also held that, as a matter of fact, the termination provision of the employment agreement governed the amount of damages available upon involuntary separation. Because NL's act was found to have been willful, the Court of Appeals held that this liquidated amount should be doubled pursuant to 29 U.S.C. § 626(b). (A-4.) What the District Court had done was to triple the base amount of damages, and the Court of Appeals held this to have been erroneous.

Because the computation of the base amount of damages below was held to be a question of contractual interpretation, a matter of fact, NL respectfully submits that Mundt has failed to raise any question of federal law that merits this Court's attention.

CONCLUSION

For the foregoing reasons, the respondent/cross-petitioner, NL Industries, Inc., respectfully submits that a writ of certiorari should issue to review the judgment of the Sixth Circuit because the question of the application

of section 623(d) of ADEA to a senior corporate officer is one of manifest importance to the uniform application of federal law. The issue of damages computation raised by petitioner/cross-respondent involves no such important question and therefore should not be reviewed.

Respectfully submitted,

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March 11, 1983

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 81-3305, 81-3306

C. A. MUNDT a/k/a CAROL A. MUNDT,
Plaintiff-Appellee, Cross-Appellant,

v.

NL INDUSTRIES, INC.,
Defendant-Appellant, Cross-Appellee.

Filed: Dec. 2, 1982
JOHN P. HEHMAN, Clerk

ORDER

Before: LIVELY, Circuit Judge; BROWN, Senior Circuit Judge; and SILER,* District Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled cases; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

Upon consideration, plaintiff-appellee/cross appellant Mundt's petition to rehear is granted and, pursuant thereto, the substitute order of November 16, 1982, has been entered.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN,
Clerk

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*The Honorable Eugene E. Siler, Jr., United States District Judge for the Eastern and Western Districts of Kentucky, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 81-3305, 81-3306

C. A. MUNDT a/k/a CAROL A. MUNDT,
Plaintiff-Appellee, Cross-Appellant,

v.

NL INDUSTRIES, INC.,
Defendant-Appellant, Cross-Appellee.

Filed: Nov. 16, 1982
JOHN P. HEHMAN, Clerk

ORDER

Before: LIVELY, Circuit Judge; BROWN, Senior Circuit Judge; and SILER,* District Judge.

Upon consideration, all orders heretofore entered by this court following argument are rescinded and the following order is substituted.

Plaintiff-appellee/cross-appellant Mundt brought an action in the district court under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* Plaintiff, a former vice-President of the defendant-appellant/cross-appellee NL Industries, Inc., alleged that he was denied promotion by defendant solely on the basis of age. Plaintiff further alleged that the defendant company terminated his employment in retaliation for his having exercised his right to file a notice of intent to bring an action for age discrimination with the Secretary of Labor, in violation of 29 U.S.C. § 623(d). Plaintiff

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*The Honorable Eugene E. Siler, Jr., United States District Judge for the Eastern and Western Districts of Kentucky, sitting by designation.

appended a state law cause of action for breach of an employment contract which specified the payment of one year's base salary ($93,000.00) in the event of termination.

Following a non-jury trial on the merits, the district judge held that the failure to promote plaintiff was not a violation of the Act but that the discharge of plaintiff was a violation in that it was in retaliation for his initiating the charge of discrimination.

The district judge awarded plaintiff as damages a judgment of $279,000.00 and determined his attorney's fee to be $8,732.50 to be paid by plaintiff out of his recovery.

Defendant has appealed the award of the recovery and plaintiff has appealed the award only insofar as it provides that his attorney's fee is to be paid out of the recovery. Plaintiff did not appeal the determination that the failure to promote was not a violation of the Act.

Defendant contended, among other things, that Mundt was not protected by the Age Discrimination in Employment Act because, as a group vice-president, he was "a control — group executive." This contention is overruled because there is no authority to support it and, in view of the purpose of the statute, it has no basis in reason.

We find that the determination by the district court that plaintiff's discharge was a violation of the Act is supported by substantial evidence.

The orders of the district court are unclear in that the recovery at one point is referred to as "back pay" and yet at another point the recovery is referred to as an amount to include $93,000.00 for one year as provided by the termination provision in the employment contract and increased by $186,000.00 for two additional years "for the retaliatory discharge."

It appears to us that a "back pay" award would be inappropriate since plaintiff did not seek reinstatement or back pay with respect to the position from which he was wrongfully discharged. On the other hand, it appears that, since the dis-

trict judge found a willful violation of the Act in the discharge of plaintiff, which finding is supported by substantial evidence, plaintiff was entitled to recover $93,000.00 as per the termination provision in his employment contract which should be doubled to allow for a recovery as liquidated damages (29 U.S.C. § 626(b)), making a recovery of $186,000.00. In addition, plaintiff is entitled to recover attorney's fees of $8,732.50 (29 U.S.C. § 626(b)). Thus, plaintiff is entitled to recover a total judgment in the amount of $194,732.50 with interest to run from date of original judgment.

It is therefore ORDERED that the judgment of the district court is vacated and the cause is remanded for entry of a judgment consistent with this Order.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN,
Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Civil Action File No. C 76-519

C. A. MUNDT

vs.

NL INDUSTRIES, INC.,

JUDGMENT

This action came on for trial before the Court, Honorable NICHOLAS J. WALINSKI, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff, C. A. Mundt, aka Carol A. Mundt, recover of the defendant NL Industries, Inc. the sum of $279,000.00 with interest thereon at the rate of 6 per cent as provided by law and his costs of action.

/s/ Nicholas J. Walinski
NICHOLAS J. WALINSKI
United States District Judge

Dated at Toledo, Ohio, this 19th day of March, 1980.

James S. Gallas
JAMES S. GALLAS, Clerk
Clerk of Court

/s/ P. L. Kurschat
P. L. KURSCHAT
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

No. C 76-519

C. A. MUNDT, etc.,

Plaintiff,

vs.

NL INDUSTRIES, INC.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WALINSKI, J:

This cause came on for trial to the Court August 6 and 7, 1979. Plaintiff requested time after the filing of a transcript to submit a post-trial brief. Both parties have filed post-trial memoranda, and the matter is now decisional.

This cause was brought under the Age Discrimination in Employment Act (hereinafter ADEA), alleging discrimination in failing to promote and finally terminating plaintiff's employment. Plaintiff appends a state law cause of action for breach of an employment contract specifying the payment of one year's salary ($93,000.00) in the event of termination. The Court will exercise pendent jurisdiction over this state law claim.

FINDINGS OF FACT

This Court has jurisdiction under the ADEA as amended, 29 U.S.C. § 621 *et seq.*

Plaintiff was hired by the Defendant NL Industries, Inc. (hereinafter NL) at age 56-1/2 years from another high-level corporate executive position. Plaintiff's experience is well set out in his post-trial memorandum and need not be repeated here.

In early 1976, three executive vice-presidents were appointed by Ray Adam, all three younger than plaintiff. When plaintiff inquired about his passover, he was told that NL "had to go with the younger guys" on several occasions. The Court has no hesitancy in finding that age was a consideration, but also finds that age was not the controlling factor.

In governing a multi-unit corporate conglomerate, the president and directors have to consider many facets of personnel in high level executive positions — not the least of these is future service to assure continuity.

The Court therefore finds that the failure to promote plaintiff was not discriminatorily age oriented so as to violate the provisions of the ADEA.

Plaintiff thereafter filed with the Secretary of Labor a letter of intent to bring suit. Pursuant to law, the Secretary notified the Defendant NL of the filing and attempted a conciliation which failed.

Upon Adam's being notified of the filing of the intent to sue letter, he called plaintiff and expressed shock and dismay and told plaintiff to leave the premises, among other things. Plaintiff notified his co-workers that he was taking an extended vacation. NL, through Adam, then took the position that plaintiff terminated his employment and terminated his employment contract.

The Court has no hesitancy in finding that the constructive termination by NL was motivated by the plaintiff's filing of his statute-empowered right to file an age discrimination claim, and was therefore a retaliatory firing by NL.

The finding above likewise disposes of the plaintiff's state law breach of contract claim. Having terminated the plaintiff's employment, by contract NL was obligated to pay at least $93,000.00 to plaintiff.

The Court finds that the retaliatory firing entitles plaintiff to three years' back pay in the sum of $279,000.00. Since that

award encompasses the year's salary provided by contract, the Court deems the sum merged into the principal award.

Detailed facts leading to the above conclusions are set out in the parties' memoranda, depositions, the evidence, and transcript, and will not be repeated here.

CONCLUSIONS OF LAW

This Court has jurisdiction under the ADEA, 29 U.S.C. § 621 *et seq.*, and pendent jurisdiction over Count III of the complaint.

The Court finds that although age may have been a factor in plaintiff's non-promotion, in the complex matter of choosing a high-level executive, age would have to be the main controlling factor before the ADEA would come into play.

> 29 U.S.C. § 623, provides, *inter alia:*
>
> (a) It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of an individual's age;
>
> * * * *
>
> (d) it shall be unlawful of an employer to discriminate against *any of his employees* . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or litigation under this chapter. *(Emphasis added.)*

The termination for exercising the rights granted by § 623(d) above was retaliatory and a violation of the ADEA.

The ADEA incorporates the remedies provision of §§ 16 (except for subsection (a) thereof) and 17 of the Fair Labor Standards Act (hereinafter FLSA), 29 U.S.C. § 626(b). The

FLSA sections are 29 U.S.C. §§ 216 and 217. 29 U.S.C. § 216(b) also provides:

> (1) Amounts owing as a result of a violation of ADEA shall be deemed to be "unpaid minimum wages or unpaid overtime compensation" under FLSA;
>
> (2) The courts are vested with jurisdiction to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of (the Act), including without limitation judgments compelling employment, reinstatement or probation, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation . . ."; and
>
> (2) Liquidated damages shall be payable "only in cases of willful violations." Liquidated damages are defined as an amount equal to the amount of unpaid minimum wages or unpaid overtime compensations.

Plaintiff is entitled to back pay at the rate of Ninety-three Thousand Dollars ($93,000.00) per year, his base salary at the time of termination. The trial was exactly three years from the date of termination, so plaintiff's back pay is 3 x $93,000 or Two Hundred Seventy-nine Thousand Dollars ($279,000.00).

Accordingly, the Court finds for the plaintiff and against the Defendant NL and awards judgment for damages in the sum of $279,000.00 and the costs of suit.

IT IS SO ORDERED.

/s/ Nicholas J. Walinski
NICHOLAS J. WALINSKI
United States District Judge

TESTIMONY OF C. A. MUNDT

Q. All right. And were you concerned about your impending reaching the age of 60?

A. I was.

Q. And why?

A. Because I felt with the way the group was going, spinning off plants and spinning off divisions, and the fact that I had not gotten any increases in pay, and the fact that Mr. Adam on numerous occasions publicly said it was a natural resources-oriented company, the fact that I couldn't get investment capital for my divisions, although they were making money, all led me to feel that I could be dispensable.

Q. Now, I want to call your attention to the end of January of 1976. You were still the Group Vice President of Fabricated Products; is that correct?

A. Yes, sir.

Q. Were you summoned to New York City on that — at that time?

A. Yes, sir.

Q. And by whom?

A. By Mr. Adam.

Q. Now, prior to that time, had you expressed these various concerns that you just included in the answer to the previous question, to Mr. Adam?

A. I had very definitely discussed with him the fact that I couldn't get what I thought was the proper capital investments to keep the businesses going and viable. That's one area.

* * * * *

Q. And it was also agreed upon that you'd have an initial compensation of, a base salary of $80,000 a year, when you started in '73; isn't that right?

A. Yes.

Q. Now, going to that termination provision, am I correct in saying that it was the understanding that NL, under that agreement, could have terminated you for any reason at all; isn't that right?

A. I think anybody could be terminated for any reason, yes.

Q. Mr. Adam wanted to go with managers of a different style, he could say, "Thank you, Mr. Mundt, but we don't want you any more."

A. He could.

Q. Or, "Mr. Mundt, we're going with executives who don't wear glasses," and you do, and could have done that too, right?

A. I suppose he could have.

Q. Is it fair to say that a chief executive of a company has the right to have his subordinates at upper management level be in tune with his needs and wants?

A. Yes.

Q. And that's a selection that he's allowed to make?

A. Yes.

Q. It's necessary in a large corporation?

A. Yes.

Q. And when you hire executives, when you were doing that, you took the same approach, didn't you?

A. Yes.

* * * * *

Q. Now, another area that you talked about was a question of management style; those are your words, is that correct?

A. Those are my words.

Q. And you agree there was a distinct difference between Mr. Adam's preference and your preference; is that right?

A. Yes.

* * * * *

A. Mr. Thomas and I had visited Southern Screw to talk about products, marketing, reorganization, that type of thing.

Q. When was that?

A. Well, it was before February of 1976. January, probably.

Q. And you told Mr. Thomas—you had a couple of drinks and you were talking?

A. Quite a few more than a couple, Mr. Gerson.

Q. And what you told him was you wanted to be promoted or paid off?

A. Right.

Q. So you knew something was about to happen, didn't you?

A. I had no knowledge that anything was about to happen. I had inklings, Mr. Gerson.

* * * * *

Q. Wasn't the question of establishing a harmonious working relationship between you and the fella to whom you're reporting a question of morale?

A. Yes.

Q. So indeed in attempting to establish that harmonious relationship, isn't it accurate to say that Mr. Adam was expressing concern with an area of morale?

A. An area of morale, yes.

Q. Now, do you remember telling Mr. DeDapper when you spoke with him on August the 2nd, that you were attempting to deal yourself a hand?

A. I made that statement either to Mr. DeDapper or Mr. Adam or both.

Q. What did you mean by that?

A. That's very simple in my mind, sir. I felt that the division, the group was going downhill. We were getting rid of plants. We could not make an acquisition to grow. The only growth was, as you've pointed out very loudly, that growth comes from sales, and the increase in dollars and so on. But we were not growing as a group, and I was concerned about that.

I'm sorry, would you—I've lost the question.

Q. I think the question had to do with your talking about dealing yourself a hand.

A. Right, okay.

Q. I must confess I haven't heard an answer to that yet.

A. Right, I'm getting to it. And I felt that the Group was being decimated. We were no longer popular, because we were not natural resources oriented, and Mr. Adam had said he was going that way. He had made a videotape, showing that the company was going that way. I was the only group vice president left in the company, and I felt that things were going downhill, and I felt rather than see myself gradually eased out, I had been a good businessman—I was a good businessman when I was hired by NL or they wouldn't have hired me, but I could see my career gradually dribbling away, and I felt that rather than see that happen, I would do something about it.

* * * * *

Q. Where did that put him in the hierachy as to salary?

A. He only trailed two of us in the company. One was myself, obviously, and the other was a gentleman who had spent his entire business career with the company, had long experience, and who headed our petroleum services operation. So, he was number three in rank.

Q. Let me ask you this: I take it based on what you've just said that at this period of time prior to the beginning of 1976 Mr. Mundt reported directly to you. Is that correct?

A. Yes, it is.

Q. What kind of a relationship did you need with a person in that position, and why?

A. Well, I think, as in any endeavor, one must have unquestioned trust with his associates. And I say that for obvious reasons. You certainly cannot circumscribe any individual with enough rules and enough guidelines if you don't trust his individual judgment, if you don't trust his integrity, if there isn't a clear understanding that he is working solely on behalf of the enterprise. Then, those unquestioned feelings and instinct as to reliability are important, obviously, no matter whether it's a football team, or whether it's sophisticated industrial enterprise.

Q. Tell the Court what was going on in the early to mid 70's in Fabricated Products that you needed to talk to him about.

A. Well, we have already mentioned the dynamic business change even then under way with the automotive companies as they were changing to different materials. We had ourselves a company which had not been carefully analyzed or evaluated. We knew that significant change was required within the company.

So, we were confronted with either making very unusual progress, or we were going to further see that shareholders were losers in the affair. They had already—the company stock

when I joined the company was, I mentioned earlier, was selling for a mere shadow of its high. So, we had to make these changes within the company. We had to evaluate the profitability of various business units, the management expertise of people running these various units, and we were confronted with sort of a do or die, make it happen situation.

Q. How did that necessity relate to your communications or the need for communications between yourself and Mr. Mundt?

A. Well, we had to believe that once we had come to decisions, whether they were easy decisions or not, that they would be carried out in an unquestioned manner, and we had to be sure that they would be done with the full spirit of the understanding, as in every case, as a well-known person said: "The buck stops here," and I happened to be the person where the buck stopped.

So, while I took counsel in regular fashion from my Board of Directors, they retained me because of an obvious reputation of problem solving and being able to achieve change. So, I had wide trust delegated by the Board of Directors and I had to exercise that after, obviously, the requisite involvement of my staff and operating heads to be sure that I had the best possible information.

Q. During the early time that Mr. Mundt was a Group Vice President did he perform satisfactorily?

A. I found his performance quite satisfactory in his introduction into the organization. He's a person who engenders very good rapport with his people. He's quite a team backer and gives his people—he did give his people significant encouragement, and moving from a rather autocratic impression type atmosphere that had been present within the organization, I found to be quite a healthy change and I thought I started to see people restore confidence in themselves, and I had to ascribe that momentum to him.

Q. To Mr. Mundt?

A. To Mr. Mundt.

Q. You just described a great strength of Mr. Mundt. Did he also have, in your judgment, some business weaknesses?

A. Well, I was disappointed as time went by. That disenchantment actually was accelerated and began to be the focal point of a number of counseling sessions between Mr. Mundt and myself.

Q. What did they concern?

A. I found that Mundt has the ability to carry out designated programs if they're carefully drawn for him. But, I found very, very limited and a distressing inability for him to detect and analyze the things that needed to be done; and I found him to have quite an ambivalent emotional makeup. He was somewhat unpredictable in these reactions, and even after a mere few months I remember that when we did select one of the operating heads to be on our Board of Directors, Mundt was quite upset as to why he wasn't selected. This was only after a few months with the company.

Q. Let me ask you just to shift slightly in that area: Was there any particular need for the compilation and analysis of business data during that period of time?

A. Yes. I guess we've all seen the kind of a seat-of-the-pants operator, whether flying a plane or running a business, and I found Mundt to be a seat-of-the-pants fellow. He took great store in seeming to pride himself into his instinctive ability to detect what was going on within the operation. But, I found he had a very limited ability to exercise the sophisticated skills of looking at the numbers and knowing what they meant, and I noticed that in some of his comments in the deposition he translated that into my expecting him to remember in detail the cost of, you know, the multiplicity of items that his unit produced. Such was not the case.

Q. What was the case?

A. He simply could not muster the kind of factual information from his own units' performance and relate them to the higher level management of the company in any kind of manner that allowed sound decision making as to the changes that should occur in business.

Q. Did you and he discuss this difference between yours and his managerial emphasis or style?

A. Yes. We did. And those were very, very repetitive and regular exchanges that we had, particularly the last year and a half that he was with the company.

Q. Was Mr. Mundt, to your knowledge, satisfied with his compensation?

A. No. It was clear that he was not.

Q. When did that dissatisfaction make itself first evident to you?

A. As I recall, when he left the company it had been quite a long period, I would say a year and a half to two years since he had received a salary change, and he was quite disappointed with this. During that same period in addition to salary we compensate on an incentive basis based on a number of things—based on how the individual performs, as well as how he is able—his business units, how closely they are able to achieve pre-set goals, and he had also seen his incentive award reduced during this period.

Q. Was any dissatisfaction with that reduction communicated to you?

A. Yes. On several occasions.

Q. When would that have been?

A. I can't remember the specific times. But, he not only communicated those to me, but he also, I thought, engaged in a very unfortunate characteristic of describing his disappointment with salary treatment to associates, as well as to people

below him. And those, it was clear from a number of sources, including several discussions which he had with me, that he was not pleased with his compensation history.

* * * * *

Q. Now, when you told Mr. Mundt that he was going to be reporting to Mr. DeDapper, what, if anything, did he express at that particular time?

A. I think that Mundt knew full well prior to this time that—he's a rather sophisticated individual. Even he knew that the series of counselings that I had had with him as to performance deficiencies, he knew from repetitive discussions about the selection. I engaged his counsel and advice in who we might select. I think he knew full well that he was not going to be selected. I had no doubt about that at that time. Never offered himself as a candidate for this enlarged position. He was not a retiring individual in proffering his own candidacy. So, I assume that his neglect in doing this was apparent. I think the whole thing came apart when I mentioned exactly who the new boss would be.

* * * * *

Q. Let me ask you this: Following this January-February period of 1976 did Mr. Mundt continue to function as a Group Vice President?

A. Yes, he did. His performance was very uneven, and I did see an evolutionary lessening of his motivation and I did see at times somewhat alarming lack of cooperation which he exhibited with his new boss, DeDapper.

Q. However, even at this time were there any plans made for his involuntary retirement?

A. There was never at any point in his career any plans or discussions or thoughts by myself or anyone else that he would be asked to leave the company.

* * * * *

NL Industries

RAY C. ADAM
Executive Vice President and
Chief Operating Officer

March 9, 1973

Mr. Carol A. Mundt
20 Somerset Downs
Ladue, Missouri

Dear Moose:

I thought it would be a good idea if I summarized the compensation arrangements that we agreed to. But, before I do that, I want to tell you how pleased both Jeff Rowley and I are that you are going to join N L. You have an excellent background for the Fabricated Products Group and we are confident that you are going to get the Group organized properly and increase its profitability.

Your base salary will be $80,000 per year and you will participate in our Management Incentive Plan. However, because of the loss of your deferred bonus at your previous place of employment, we will guarantee that you will receive at least $50,000 in bonus payments cumulative for the years 1973-74-75. Of this total, at least $15,000 will be paid for the year 1973 and at least $25,000 for the year 1974. The balance, if any, will be paid in 1975.

In addition, you will be granted a stock option of ten thousand shares—the choice of qualified or non-qualified is yours. You should let us know shortly if you choose the qualified option, as we would expect it to be acted on at the Board meeting on March 27th.

Also, as we agreed, in the unlikely event that N L would wish to terminate your services, we will pay you severance pay of one year's base salary. If your services are terminated or severed for any reason, N L will be relieved of any bonus payment obligation not fulfilled as of the termination of employment.

Best regards,

/s/ RAY
Ray C. Adam

RCA:mac
cc: Mr. E. R. Rowley

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Office-Supreme Court, U.S.
FILED
APR 13 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1489

In the Supreme Court of the United States

October Term, 1982

NL INDUSTRIES, INC.,
Cross-Petitioner,

vs.

C. A. MUNDT,
Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION

The Cross-Respondent C. A. Mundt, respectfully requests that this Court deny the Cross-Petition for Writ of Certiorari, seeking review of the Sixth Circuit opinion in this case. That opinion is not reported but is contained at page A-2 of the appendix to the Cross-Petition.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decisions below interpreting the anti-retaliation provisions of ADEA do not conflict with the decisions of other Courts of Appeal, but merely give effect to the clear mandate of the statute (29 U.S.C. 623(d)).

Section 623(d) of the ADEA (29 U.S.C. 623(d)) provides that "it shall be unlawful for an employer to discriminate against *any of his employees* . . . because such individual has opposed any practice made unlawful by this section, or . . . has made a charge . . . under this chapter." (emphasis supplied).

It is clear from the District Court's findings of fact that Cross-Respondent Mundt was discharged solely for filing a charge of discrimination under ADEA. No other conduct of Cross-Respondent caused his termination. He merely availed himself of the opportunity given to him by the act of filing with the Secretary of Labor (under the former practice) a Notice of Intent to bring suit after 60 days for an alleged violation of ADEA.

Since R. C. Adam, Cross-Petitioner's chief operating officer, had notified Mundt on four occasions that he was being passed over for promotion because of his age, Cross-Respondent certainly had a reasonable basis for filing his Notice with the Secretary of Labor. Under no stretch of the imagination could his action be considered frivolous or without a basis in fact.

The cases from other circuits cited by Cross-Petitioner in support of its position that there should be "an exemption to the coverage of the anti-retaliation provisions when confidential or managerial employees file discrimination claims" support no such position, nor does the statute.

In each of the cited cases, the employee engaged in a course of conduct which was totally inconsistent with his or her obligation to the employer, while in the case at bar, the employee merely filed a Notice with the Labor Department.

In *Smith v. Singer Company*, 650 F.2d 214 (9th Cir. 1981), the complainant was the company's director of equal employment opportunity programs. As such he secretly filed discrimination complaints against his own company with Defense Contracts Administration Services (DCAS) and Equal Employment Opportunity Commission charging widespread discriminatory practices allegedly against other employees, not himself. For three months, while denying to his own company any knowledge of the identity of the complainant (who was himself) he actively participated with DCAS in their investigation of his charges. He conducted secret meetings with selected minority employees to solicit complaints of discrimination. As stated by the District Court, quoted in the opinion, at p. 216:

> He denied knowledge of the identity of the complainant and affirmatively misled Singer as to his own role in the investigation. By doing so, he ceased to perform his duties as a Singer employee in charge of affirmative action, and he commenced work inconsistent with that position. His primary interest necessarily became substantiating his own complaints *against* Singer rather than working *with* Singer to pursue affirmative action and to overcome any real violations which could be found by the EEOC and the DCAS. Yet Smith continued without disclosure as the one person designated to act as a liaison with the DCAS. This was a manifest failure to perform the vital duties which his position required, and this failure justifies Singer's decision to dismiss him. Smith, like any other

employee, cannot be allowed to use an antidiscrimination complaint to excuse a clearly inadequate job performance such as that demonstrated by the admitted facts.

In *Pendleton v. Rumsfeld*, 628 F.2d 102 (D.C. Cir. 1980) both complainants were black employees at Walter Reed Army Medical Center, one a chemist and one a dictaphone transcriber. Both were made temporary EEO Counselors. Claiming discriminatory employment practices, the two complainants organized a demonstration in the offices of a Colonel in the Food Services Division. The demonstration, to which the media were invited, was in violation of orders. Organizing a prohibited demonstration was deemed by the Court not to be protected conduct under the statute.

In *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976) the complainant was a female scientist at her employer's research facility. The District Court found that she made constant complaints to her colleagues, damaging relationships among members of the cell biology group and interfering with laboratory research. She committed acts of disloyalty including assertions that the Foundation was in jeopardy of losing its federal grant money, and challenging the associate director to take sides in her dispute with the director. As stated by the First Circuit, her activities demonstrated that necessary personnel could not work successfully with her; research assistants in her lab were unhappy and quit; senior scientists complained that her behavior impeded their research and the director and assistant director found it impossible to reach any compromise with her. She was a totally disruptive force in the Foundation.

Finally, in *Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325 (5th Cir. 1980) complainant was a black, male Director of Compliance in the Equal Employment Opportunity office. He filed a complaint for a black female employee in violation of prescribed administrative procedures. The Courts found that complainant was fired not in retaliation but because of improper handling of his job, mismanagement of his staff, refusal to comply with terms of his job description and refusal to follow instructions from his superior.

In each of these cases the Courts found either incompetence or disruptive behavior. In each of these cases the employee went far beyond the mere filing of a complaint. In the case at bar the employee merely filed a Notice with the Labor Department and it was *solely* on that basis that he was terminated. There was no evidence that this filing was in any way disruptive or violative of company rules. The employee was fired within 48 hours of the company learning of the filing of his complaint. Accordingly, there was insufficient time in which to determine any effect of the act of filing.

The Cross-Petitioner made a similar argument in the District Court. In response the District Judge held that:

> Notwithstanding the all inclusive language of the statute, defendant contends that in enacting the ADEA Congress never intended to have the judiciary scrutinize corporate employment decisions concerning persons or positions at a company's top policy-making echelon. In short, defendant requests the Court to hold that employment decisions involving persons at the higher levels of the corporate hierarchy are *exempt* from the ADEA.
>
> Significantly, defendant cites no authority in support of its assertion that Plaintiff's First and Second

> Claims for Relief are "beyond the scope of Congressional intendment." Certainly the statutory language does not support that position, and nor does the statute's legislative history. While the Court is not unsympathetic to defendant's concerns in this regard, it is the function of the Congress and not the courts to determine the protective measures to be afforded older workers. If defendant finds the ADEA overbroad in its scope, it may petition Congress for a statutory amendment permitting the exception it now seeks to create by judicial fiat. (Memorandum of September 6, 1978 denying Motion to Dismiss.)

In addressing a similar claim, the Sixth Circuit stated:

> Defendant contended, among other things, that Mundt was not protected by the Age Discrimination in Employment Act because, as a group vice-president, he was "a control—group executive." This contention is overruled because there is no authority to support it and, in view of the purpose of the statute, it has no basis in reason.

We note, as did the District Court, that the statutory prohibitions against retaliation run in favor of "employees", not just lower level employees. Congress has carved out no exception for employees in "sensitive positions." As suggested by the District Court, Cross-Petitioner's complaint should be addressed to the Congress and not to the Courts.

2. The decision below is not inconsistent with opinions of this Court regarding confidential or managerial employees.

Cross-Petitioner next invites this Court to adopt a high level employee exception to ADEA by reference to two cases involving the National Labor Relations Act.

This Court held in *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 288 (1974):

> In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that "managerial employees" are not covered by the Act.

No such factors are present in the ADEA or, even by extension, in Title VII cases. The entire purpose of Title VII and ADEA is to eradicate discrimination. There is no policy reason for excluding upper management. Cases relating to collective bargaining are clearly irrelevant. Different considerations apply.

If Cross-Petitioner were correct, a black vice-president could be fired with impunity for filing a race discrimination complaint. To state the proposition is to show its erroneous basis. No different rules should be applied to age cases.

CONCLUSION

For these reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 82-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NL INDUSTRIES, INC., *Cross-Petitioner*,

v.

C. A. MUNDT, *Cross-Respondent*.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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CROSS-PETITIONER'S REPLY TO CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

CROSS-PETITIONER'S REPLY TO CROSS-RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to this Court's Rule 22.5, Cross-petitioner NL Industries, Inc. ("NL")[1] herein replies to Cross-respondent C. A. Mundt's ("Mundt") Brief in Opposition to NL's Cross-petition in No. 82-1489. NL has this date also filed a Brief in Opposition to the Petition for Writ of Certiorari filed by Mundt in No. 82-1389.[2]

[1] NL Industries, Inc. has no parent companies, or subsidiaries (except wholly-owned subsidiaries) or affiliates which are publicly owned.

[2] NL had opposed Mundt's Petition as part of the brief as to its own Cross-Petition for a Writ of Certiorari filed in No. 82-1489 at 14-15.

REPLY TO MUNDT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

I. NL DID NOT TERMINATE MUNDT MERELY BECAUSE HE FILED A NOTICE OF A CLAIM UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT BUT BECAUSE THE CIRCUMSTANCES SURROUNDING THAT FILING, ESPECIALLY MUNDT'S ADMITTED MOTIVE, WERE INHERENTLY INCOMPATIBLE WITH HIS CONTINUING TO FULFILL THE RESPONSIBILITIES OF A SENIOR CORPORATE OFFICER.

Contrary to Mundt's suggestion (Brief in Opposition at 3), he was *not* discharged because he "merely filed a Notice with the Labor Department." Instead, Mundt's employment was terminated because of the circumstances surrounding that filing, particularly his admitted motivation to "deal himself a hand." By filing with the Labor Department, Mundt was not attempting to redress age discrimination, which the District Court found not to exist. Rather, he intended to pursue ulterior purposes which included his desire to be "promoted or paid off" and to change the business direction of the company.

In pursuing this course, Mundt failed to communicate with his superiors, adversely affected company morale by involving subordinates in his complaining, and utterly destroyed the trust and confidence between himself and his superiors that was essential to the performance of the Group Vice President's function. By the totality of these actions, which motivated filing of the discrimination claim, Mundt pitted himself against the company's management of which he was a part. Having done so, he acted in a manner entirely inconsistent with the performance of his duties to the company or the retention of his position.

Mundt contends that his situation is distinguishable from the actions described in the cases cited in support of

NL's argument that this Court should recognize a conduct-based exemption from the coverage of the anti-retaliation provisions of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*[3] He agrees that in each of those cases the employee's conduct was "totally inconsistent with his or her obligation to the employer." Brief in Opposition at 3. And in so doing, Mundt, apparently without realizing it, pits himself against the Sixth Circuit.

Although Mundt also attempts to argue that there should be no conduct-based exemption from ADEA coverage, he immediately contradicts himself when he addresses the issue of his own conduct. In attempting to distinguish his conduct from that of the employees in the cases cited by NL in favor of the exemption, Mundt implicitly concedes that such a conduct-based exemption from ADEA coverage must be available in appropriate cases. He thus constructively supports the holdings of the First, Fifth, Ninth and D.C. Circuits in the cited cases. However, in deciding the case at bar, the Sixth Circuit refused to recognize the exemption based on conduct inconsistent with employment duties. That is the reason why NL has cross-petitioned for a writ of certiorari — to resolve the conflict among the circuits on this issue.

NL agrees with Mundt that the cited cases involved individuals who were terminated from employment because their conduct was inconsistent with their obligations to their employers. Mundt's conduct was, according to the evidence, of precisely the same category, especially

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[3] *Smith* v. *Singer Company*, 650 F.2d 214 (9th Cir. 1981); *Pendleton* v. *Rumsfeld*, 628 F.2d 102 (D.C. Cir. 1980); *Whatley* v. *Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325 (5th Cir. 1980); and *Hochstadt* v. *Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976).

given his admitted ulterior motives. Analogous case law demonstrates that NL acted reasonably and properly and that Mundt's conduct should be held to be unprotected by ADEA. The Sixth Circuit erred in not recognizing this exemption, and in attempting to distinguish his own conduct from that described in the case law, which by implication acknowledges the need for such an exemption in certain circumstances, Mundt highlights the court's error. In so doing, his "opposition" really amounts to support for the Cross-Petition.

II. THE POLICIES SUPPORTING THE JUDICIALLY-RECOGNIZED EXEMPTION OF MANAGERIAL EMPLOYEES FROM THE COVERAGE OF THE NATIONAL LABOR RELATIONS ACT ARE EQUALLY APPLICABLE TO AN ACTION INVOLVING ADEA.

NL also has suggested that the holdings below are inconsistent with this Court's decisions acknowledging a status-based exemption of confidential and managerial employees from the coverage of the National Labor Relations Act. In attempting to address this judicially-implied exemption, Mundt focuses only on the collective bargaining aspect of the NLRA. He argues that because ADEA is not directed at protecting that interest, the policy reasons for the exemption of confidential and managerial employees from the NLRA are inapplicable to the instant case. This view is incorrect.

In the first place, the NLRA governs not only collective bargaining but also a broad variety of concerted activities, and it protects employees who engage in these activities from employer retaliation. See 29 U.S.C. § 158(a)(3). However, the implied exemption of confidential and managerial employees is categorical: employees of that level are unprotected by any of the provisions of the NLRA.

In the second place, the policy considerations behind the NLRA exemption and the ADEA exemption sought here are exactly the same. It is inherently contradictory for a senior corporate officer such as Mundt to become the corporation's adversary because the corporation, whose policy he creates, is entitled to his undivided loyalty. *See NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 102 S.Ct. 216, 230 (1981) (Powell, J., dissenting); *NLRB* v. *Bell Aerospace Corp.*, 416 U.S. 267, 283, 289 (1974). For this reason, this Court's decisions recognizing the necessary exemption to the coverage of the NLRA should require a similar exemption as to ADEA.

CONCLUSION

For the foregoing reasons, as well as those set forth in its Cross-petition, NL Industries, Inc. respectfully submits that the writ of certiorari sought in NL's Cross-petition in No. 1489 should issue.

Respectfully submitted:

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